IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

BLAZEY CZAPLICKI,

Petitioner,

vs.

The vessel "SS HOEGH SILVERCLOUD" her boilers, engines, tackle, apparel and furniture, OIVIND LORENTZEN, as Director of Shipping and Curator of the Royal Norwegian Government, doing business under the name and style of THE NORWEGIAN SHIPPING AND TRADE MISSION, KERR STEAMSHIP COMPANY, INC., and HAMILTON MARINE CONTRACTING COMPANY, INC.

BRIEF OF RESPONDENT, HAMILTON MARINE CONTRACTING COMPANY, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement of the Case

The petitioner, a longshoreman employed by Northern Dock Co., was injured in the course of his employment on September 6, 1945. On the same day his employer filed with the Federal Compensation Commission a report of his accident (Libelant's Exhibit 3). On September 17, 1945, the libelant called at the office of The Travelers Insurance Company, the insurance carrier for his employer, to discuss his rights, and told the company that he was undecided whether to take compensation or to sue the third-party. On the same day the Travelers Insurance Company filed a notice with the compensation commission notifying them that the claim was controverted because

the injured party was undecided as to whether he would accept compensation or sue the third-party (Libelant's Exhibit 4). On September 27, 1945, the libelant, at the request of the Compensation Commission, called at its office and the provisions of Section 33 (b) of the Longshoremen's and Harbor Workers' Act were explained to him. He then stated that he wished to receive compensation and to waive any rights to his third-party action, and filed a claim for compensation (Libelant's Exhibit 1; Respondent Hamilton's Exhibit A). On September 28, 1945, a formal order and award of compensation to the libelant was made and filed, and copies were served on the libelant and on the employer and its carrier (Libelant's Exhibit 2).

It was conceded at the hearing before Judge Ryan that compensation was paid pursuant to that award, and accepted by the libelant. It was further admitted on the hearing before Judge Ryan that the deputy commissioner of the Second Compensation District duly made an award and entered an order directing payment of compensation to the libelant in accordance with the terms of the compensation act. The total compensation paid was $160.72, which, through a typographical error, is stated to be $16,072, in the opinion of the Court of Appeals.

On April 30, 1946, the libelant commenced a third-party suit in his own name against the respondent, Kerr Steamship Company, Inc., in the Hudson County Court of Common Pleas, in the State of New Jersey. The action was dismissed for failure properly to serve the defendant. An action was then commenced in the Supreme Court, New York County, which was later discontinued. The present action was instituted on June 12, 1952, seven years after the plaintiff was injured.

The respondents, Silvercloud, Gjvind Lorentzen, and Kerr Steamship Company, Inc., filed exceptions to the libel, alleging that the libelant was not a proper party because his cause of action had been assigned to his employer

by virtue of the statute; the respondent, Hamilton Marine Contracting Company, Inc., served an answer in which the same plea was alleged as a complete defense. All respondents pleaded that the cause of action was barred because of laches. The latter plea was not disposed of in the District Court, the libel having been dismissed on the sole ground that the libelant was not a proper party to the litigation. The Court of Appeals affirmed the dismissal on the ground of laches. It discussed, but did not pass upon, the question as to whether the cause of action had been assigned by virtue of the statute.

POINT I

The assignment resulting by operation of Title 33 U. S. C. A., Sec. 933 (b) is, in the absence of fraud, absolute, vesting in the employer or the insurance carrier complete control of the cause of action against the negligent third-party until a recovery is had either by settlement or after a trial.

Acceptance of compensation under an award in an order filed by the deputy commissioner operates as a binding election, divesting the claimant of his cause of action against the third-party and vesting that cause in the employer or insurance carrier. The election may be set aside on equitable grounds only if fraud is practiced on the injured workman by his employer or by his employer's carrier. In this case fraud was neither claimed nor proved. The petitioner, therefore, had no cause of action on which to sue when he instituted this litigation, and the dismissals by the three judges in the District Court, and the subsequent affirmance by the Court of Appeals, were entirely proper.

The pertinent provisions of the Longshoremen's and Harbor Workers' Act, 33 U. S. C. A., in actual language and clear intent, sustain those dismissals. The provisions read:

"§ 933. (a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the Secretary may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person. * * *

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain * * * (2) The employer shall pay any excess to the person entitled to compensation or to the representative. * * *

(i) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

It is to be noted that by virtue of subdivision (b) it is acceptance of compensation under an award in an order filed by the commissioner which constitutes the binding election and divests the claimant of his cause of action. As the act was first written, payment of compensation by the employer, and its acceptance by the injured employee,

constituted the election. This led to disputes as to whether a binding election had been made, or whether the employee had accepted compensation without knowledge of his rights. (*Cf. Johnsen* v. *American Hawaiian S.S. Co.*, 98 F. 2d 847, 850.) To avoid such disputes the section was amended to its present form in which acceptance of compensation under an award constitutes a binding election. There is no room left for claims that the election was made by the injured workman in ignorance of his rights. In the proceedings leading to the award the workman is apprised of his rights, as the petitioner was in this case, and he is then free to choose whether to sue or to accept compensation.

It has never been suggested in any case that a binding election once made does not divest the employee of his cause of action and with it his control over that cause. (*Hunt* v. *Bank Line*, 35 F. 2d 136; *Johnsen* v. *American Hawaiian S.S. Co.*, 98 F. 2d 847; *Moore* v. *Hechinger*, 127 F. 2d 746; *Christiansen* v. *United States*, 194 F. 2d 978.) These decisions are at one in approving the analysis of the situation outlined in *Hunt* v. *Bank Line, supra*:

> "When all of these sections are considered together, it is clear that the intention of the act is to require the employee who claims to have been injured by the negligence of a third person to elect whether he will accept compensation under the act or proceed against such third person. If he elects to receive compensation, his cause of action is transferred, and he has no other or further interest therein, unless the employer recovers more than enough to reimburse him for the compensation paid, with costs and expenses, in which event the excess belongs to the employee. * * * He can elect which course he will follow, but he cannot follow both. * * * It is the employer, to whom the cause of action is assigned upon payment of compensation, who is given the right of deciding whether he will hazard the costs and expenses of suit. It is the employer who

is given the power to determine whether a compromise shall be accepted or not. And the employee, having accepted the compensation which the law has fixed, has no further interest in the matter, unless the employer decides to sue and succeeds in recovering more than is necessary for his reimbursement. Then, and not until then, the interest of such employee arises, and this is given by the statute to the employee not, we think, because he is deemed to have any interest in the cause of action, but to avoid the unseemly spectacle of the employer realizing a profit from his injury."

This Court has expressed similar views in its decisions in *Doleman* v. *Levine*, 295 U. S. 221, and *Aetna Life Insurance Co.* v. *Moses*, 287 U. S. 530, which hold that, where a binding election is made, "complete and unqualified transfer is intended."

In the states whose compensation acts most closely resemble the Federal Act, it has uniformly been held that the election transfers the cause of action, and deprives the claimant of further control over it. (*Whalen* v. *Athod Mfg. Co.*, 242 Mass. 547; *Skakandy* v. *State of New York*, 274 App. Div. 153.)

That is not to say that the injured workman is deprived of all interest in the outcome. If the employer or the insurance carrier chooses to enforce the right, the injured workman has an interest in the recovery. And to that extent the employer or carrier becomes a trustee of the fund recovered, having the obligation to pay over to the injured employee anything over the amount necessary to recoup its payments. Obviously that is all that was intended in the dictum of Mr. Justice Learned Hand in his opinion in *United States Fidelity & Guaranty Co.* v. *United States*, 152 F. 2d 46, when he said:

"* * * the assignee holds it for the benefit of the employee so far as it is not necessary for his own re-

coupment. The assignee is in effect a trustee, and, although it is true that the statute gives him power to compromise the whole claim, he must not, in doing so, entirely disregard the employee's interest. Certainly, he may not in advance release the whole claim upon consideration that he shall be personally released from his liability for Workmen's Compensation.'"

Nothing in the dictum itself, or in the authorities cited to support it, sustain the interpretation sought to be given to it by the petitioner, that the employee retains control over the cause of action and a right to interfere in its prosecution. That the same insurance carrier insures the employer for compensation and the negligent third-party for liability, while it may raise a question, cannot have the effect of changing the law. If the law gives to the employer or insurance carrier complete control over the cause of action, and all the authorities hold that it does, then the motives for prosecuting or not prosecuting that cause of action would seem to be irrelevant. As a matter of policy, divided control of the cause of action would raise more problems than it would solve. That is apparent in the present case. The claimant received minor injuries, his total compensation payments amounting to $160.72. A year later he claimed further injuries which he alleged were the result of his accident. These later injuries were not discovered or treated by the physician under whose care the plaintiff came immediately after his accident, and who treated the plaintiff for several weeks until in his opinion the injuries were entirely cured. It would seem unreasonable if, under those circumstances, the insurance carrier was under an obligation, or under some legal compulsion, to commence an action in an effort to establish liability for the claimed injuries and causal connection between the injuries and the accident. It would certainly seem to be within the reasonable discretion of the insurance carrier to determine that as things stood the institution of litigation was not advisable.

It has frequently been pointed out by the courts that the Workmen's Compensation Act is not perfect, and does not work perfectly under all circumstances. Dissatisfaction has been expressed before now with the assignment feature of the act, and for the same reasons as are here advanced by the petitioner. Despite many amendments to the act, the assignment provision has been retained in substantially its original form. The Congress, with knowledge of the established interpretation given to the provision by the courts, has seen fit not to amend it. There is no warrant in the history of the legislation, nor in the language or intent of the provision, which would justify importing into it the trustee relationship which the petitioner urges. Such a change in the law, if advisable, is a proper subject for Congressional action.

POINT II

The petitioner was guilty of laches.

The petitioner was injured on September 6, 1945, and this action was filed on June 12, 1952. Had he sued at common law, his action would obviously have been barred by the statute of limitations, whether the short statute in the case of negligence or the six year statute in the case of breach of warranty is applied. While the issue of laches is not to "be determined merely by a reference to and a mechanical application of the statute of limitations" (*Gardner* v. *Panama Railroad*, 342 U. S. 29), in the absence of an explanation for the delay, a court of equity will use the statutory limitation as a guide in determining whether to entertain the action or not (*Sullivan* v. *Portland and K. R. Co.*, 94 U. S. 806).

In this case no excuse was shown for the delay in bringing action. Actions had in fact been commenced in 1946 and 1947, which had not been pursued. No explanation was offered. Under those circumstances the Court of

Appeals was justified in finding that the petitioner was guilty of laches (*The Harrisburg* v. *Rickards*, 119 U. S. 199). In the *Harrisburg* case, *supra*, the opinion states:

> "No question arises in this case as to the power of a court of admiralty to allow an equitable excuse for delay in suing, because no excuse of any kind has been shown. As to this, it only appears that the wrong was done in May, 1877, and the suit was not brought until February, 1882, while the law required it to be brought within a year."

POINT III

The award was properly made.

At the hearing before Judge Ryan, plaintiff's counsel was asked by the court:

> "Do you admit, that thereafter and on September 28, 1945, the deputy commissioner of the Second Compensation District duly made an award and entered an order directing payment of compensation to the libelant in accordance with the terms of the compensation act. Mr. Baker: We admit that, but we would like counsel to also admit that that award was made without a hearing, without any trial or without any notice to any of the parties, and without the libelant, Mr. Czaplicki, the claimant in the compensation case, being represented by counsel." (Appendix to libelant's brief, p. 17a.)

The petitioner now attacks the award, claiming that it is an "intermediate order", apparently on the ground that the employer was not given notice a claim was filed. It is submitted that the argument has no validity.

Section 921 of the compensation act provides that a compensation order "shall become effective when filed in the office of the deputy commissioner as provided in section

919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter." If the employer or the carrier had any objection to make on the ground of notice—which they did not—they had thirty days within which to make that objection; otherwise they waived it (*Parker* v. *Motor Boat Sales*, 314 U. S. 244).

The carrier knew that an accident had occurred and had so notified the compensation commission. Learning later that the injured employee was undecided as to whether he should take compensation or sue a third-party, the carrier notified the Deputy Commissioner, adopting a procedure suggested by the Supreme Court in *American Stevedores* v. *Porello*, 330 U. S. 446, 455. The libelant was then called in by the Compensation Commission, advised fully as to his rights of election, and he elected to file a claim for compensation rather than sue the third-party. Under those circumstances, since no hearing was ordered or requested or necessary, an award was made and filed. It is difficult to understand why the libelant calls this award "an intermediate order". There is no provision in the act which requires that an award make a final disposition of the compensation claim; the great majority of awards made by the Commission are not final. They are subject to change, modification or termination as the circumstances warrant. The requirement as to the ten-day notice was waived by the employer and his carrier, and cannot therefore affect the validity of this award (*Harris* v. *Hoage*, 66 F. 2d 801, 804; *Globe Stevedoring Co., Inc.* v. *Peters*, 57 F. 2d 256).

The Commission here had jurisdiction of the parties and of the subject matter. The award was made and filed by the commissioner after the notice required was given or waived. Even less formal procedures in the making of awards have had the sanction of the Courts. It was said in *Grass* v. *Lorentzen*, 149 F. 2d 127, 128:

"As a result of the amendment there must now be official action by the deputy commissioner establishing an award of compensation in order to make such acceptance an assignment of the employee's cause of action against the third-party. Although the award may be informal, see *Toomey* v. *Waterman Steamship Corp.*, 2 Cir., 123 F. 2d 718, it must amount to an award by the deputy commissioner."

The award in this case was made in compliance with the statutory procedural requirements. Neither party appealed from it, and it became final after the expiration of thirty days from the date of its filing. Quite obviously it cannot now be subjected to collateral attack by the petitioner.

CONCLUSION

The petition for the writ of certiorari should be denied.

Respectfully submitted,

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